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No. 2903

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN GILL, for whom has been substituted Maurice McMicken, Administrator with the will annexed of John Gill, deceased,

Plaintiff in Error,

vs.

FRANK WATERHOUSE,

Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE.

Frank Waterhouse, Limited, was incorporated in December, 1897, under the laws of Great Britain, for the purpose of engaging in the shipping and insurance business. The registered office of the company was in London, England, but the business of

the company was principally conducted in Seattle and Tacoma, though all of its shareholders, except Frank Waterhouse, were residents of either England or Scotland. (Record p. 37.)

On March 18, 1898, Frank Waterhouse, Limited, commenced to borrow money from the London Branch of The Commercial Bank of Scotland, Limited. The advances made by the Bank to Frank Waterhouse, Limited, were made under separate accounts. One of these accounts was known as the "Loan Account," and £15,000 was advanced to Frank Waterhouse, Limited, by the Bank upon this account. Another account was known as "No. 2 Account," and £5,000 was advanced to Frank Waterhouse, Limited, on this account. The remaining account was the current or general account of Frank Waterhouse, Limited (Record, p. 46).

On February 16, 1899, Frank Waterhouse, who at that time was a resident of Tacoma, Washington, but was then in London, executed, in the presence of the manager and accountant of the Bank, the following letter of guaranty: (Record, pp. 3, 4.)

"To The Commercial Bank of Scotland, Limited.

I, Frank Waterhouse, Tacoma, Washington, United States, America, hereby guarantee you payment of all sums for which Frank Waterhouse, Limited, of one hundred and forty-seven Cannon Street, London, whether on an account or accounts kept in their name in your books and operated on for them by cheques or drafts signed by two of their directors and their secretary, all for the time, or on bills, promissory notes or other obligations, are or may be liable to you, but the amount for which I shall be

liable under this Guarantee shall not exceed twenty-one thousand pounds sterling with interest, from the date or dates at which the said Frank Waterhouse, Limited, have become or shall become indebted to you; and I declare (1) that you shall be entitled to require from me whenever you think fit, a payment or payments to account of my liability; (2) that you may grant to the said Frank Waterhouse, Limited, or to the obligants in any bills of exchange or promissory notes, or other writings received by you from them, or in which they may be liable to you, time or other indulgence, and compound with them or such obligants, and may give up any securities which you now have or may hereafter have belonging to the said Frank Waterhouse, Limited, or to others, all without consulting me, and without affecting my obligation to you; (3) that I shall not be entitled to rank on the estate of the said Frank Waterhouse, Limited, in respect to any payment or payments to account as aforesaid, nor to have the benefit of any securities such as aforesaid until your whole claims against them are satisfied; and (4) that this guarantee is a continuing obligation and can be recalled by me only by writing and shall remain in force notwithstanding my death until recalled in writing, and shall apply to all sums for which the said Frank Waterhouse, Limited, shall become indebted to you prior to such recall.

In Witness Whereof, These presents are subscribed by me at London on the sixteenth day of February eighteen hundred ninety-nine before these witnesses: Andrew Whitlie, Manager, and William Bamford Lang, Accountant, both of your branch there.

(Signed) Frank Waterhouse.

(Signed) And. Whitlie,
Witness,
(Signed) W. B. Lang,
Witness."

The total amount, plus interest to October 31, 1903, loaned by the Bank between March 18, 1898, and October 31, 1903, was £103,217:11:11, no part of which had been repaid at the time of the institution of this suit, except the sum of £80,319:15:6. "The correctness of the accounts was never disputed by Frank Waterhouse, Limited, or by any one else." (Record, p. 45.)

"Demands were made upon the company and numerous verbal demands were made upon the Directors and Secretary by the Bank for payment of the indebtedness shown to be due by the company by said accounts" (Record, p. 36) and on October 31, 1906, the Bank wrote the following letter to Frank Waterhouse at Seattle: (Record, p. 90)

"31st October, 1906.

Dear Sir:

The Directors have resolved to call for payment of the advances to Frank Waterhouse Limited, Salisbury House, London, for which in respect of your letter of Guarantee, dated 16th Feby. 1899, you are responsible to the Bank. I have therefore to request you to make immediate payment of the sum due and relative interest. Annexed is a note of the sum due, with interest to date.

Yours faithfully,

(Signed) J. L. Anderson,
Secretary.

Note of sums due by Frank Waterhouse Limited within referred to.

		Interest from 31st Octr 1903 to 31st Octr 1906
Loan A/C	£15000	£2257.11.11
No. 1 A/C	1151.17.9	169.14.10
No. 11 A/C	3479.13.3	536.18.10
	19631.11	2964. 5. 7
Add Interest	2964. 5.7	
	22595.16.7"	

The Bank had no security for its loan except four letters of guaranty, one of which was that executed by the defendant and hereinbefore set out (Record, p. 46). The Bank being desirous that the debt owing by Frank Waterhouse, Limited, should be repaid, Mr. Alexander McNab, who was one of the guarantors of the company's debt but who was not in a position to meet the guaranty if it were enforced against him, approached John Gill as a friend and asked him to *take over the debt*. Gill agreed to do so, and paid to the Bank the sum of £22,897:16:5, or $109,909.54. (Record, p. 26.) Payment to the Bank by Gill was made in the first part of 1907 and on October 8, 1907, the Bank executed in favor of John Gill an assignment of its claim and the defendant's letter of guaranty. (Record, p. 91.)

On April 7, 1908, an extraordinary general meeting of the shareholders of Frank Waterhouse, Limited, was held, and at that time a liquidator for the company was appointed. Subsequently the liqui-

dator wrote to the Bank, intimating his appointment, and asking the Bank to send him a certified statement of its claims in the liquidation. The Bank thereupon informed the liquidator that the company's indebtedness to it had been settled by Mr. John Gill, S. S. C., Edinburgh, and that its claim had been assigned to him. Thereafter Mr. Gill rendered his claim to the liquidator. The liquidator admitted the claim and paid to Mr. Gill, and, after his death, to his executors, dividends in respect of Mr. Gill's claims in the liquidation to the amount of £2924:17:4 (Record, pp. 36, 37).

In March, 1909, the present suit was brought. John Gill having died in December, 1910, Maurice McMicken, Administrator with the will annexed of the estate of John Gill, deceased, was substituted as party plaintiff in the suit. The case came on for trial in June, 1916. All of the testimony adduced at the time of the trial, except certain documentary evidence relating to the jurisdiction of the Court, was in the form of depositions taken under a stipulation which provided, among other things, that all objections to the taking of the testimony, save as to the relevancy or materiality of any question or answer, or part thereof, was waived. (Record, p. 52.)

The Court, at the conclusion of plaintiff's testimony, granted a non-suit upon the following grounds:

First: That there was no sufficient evidence that The Commercial Bank of Scotland had notified Waterhouse of its acceptance of his guaranty so as

to constitute a mutual contract of guaranty between them; and

Second: That the evidence of the accounts of the Bank showed payment of the indebtedness of Frank Waterhouse, Ltd., to the Bank on February 15, 1907, without any sufficient evidence of mutual intention on the part of the Bank and John Gill that the payment of the indebtedness by Gill was based upon an understanding or agreement that payment was made in consideration of an assignment to be executed to him, and that the subsequent assignment by the Bank to Gill was a mere afterthought (Record, p. 50).

ASSIGNMENT OF ERRORS.

I.

The Court erred in rejecting the following evidence offered by the plaintiff upon said trial, to-wit:

An assignation made by The Commercial Bank of Scotland, Limited, in favor of John Gill, and dated October 8, 1907, same being Exhibit "D" attached to the bill of exceptions (Record, p. 31).

II.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to-wit:

The account between The Commercial Bank of Scotland, Ltd., and Frank Waterhouse, Ltd., which said account is attached to the assignation described in Assignment of Error I herein. (Record, p. 31.)

III.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to-wit:

"The payment of £22,897:16:5 was made to the Bank by the said John Gill in exchange for the assignation in his favor. The payment was made by a cheque of his own I understand. I have not the particulars of the cheque." (Record, p. 32.)

IV.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to-wit:

"I have examined the copy of the accounts of Frank Waterhouse Ltd. with The Commercial Bank of Scotland Ltd. appended to the deposition of George Sutherland Coutts, taken on the 17th December 1913, and I am satisfied that said accounts correctly set forth the amount advanced to said Frank Waterhouse, Ltd. The amounts due by Frank Waterhouse Ltd. to the Bank at 31st October 1903 were as follows: (1) On the current or general account £1151.17.9. (2) On the loan account £15,000 and (3) on No. 2 account £3479.13.3. These amount in all, with interest to February 15, 1907, to £22,897.16.5." (Record, p. 35.)

V.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to-wit:

"Subsequently I wrote to the Commercial Bank of Scotland Ltd., intimating my appointment and asking them to send me a certified statement of their claim in the liquidation. They informed me that

the Company's indebtedness to them had been settled by Mr. John Gill, S. S. C., Endinburgh, and that they had assigned their claim to him:" (Record, p. 36.)

VI.

The Court erred in receiving the following evidence offered by the defendant herein upon said trial, to-wit:

An agreement made on the 6th day of October, 1900, between Frank Waterhouse, of Seattle, Washington, of the one part, and Frank Waterhouse, Limited, a corporation, of London, E. C., of the other part, which said agreement is attached to the bill of exceptions herein, marked Exhibit "I" and made a part thereof. (Record, p. 38.)

VII.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to-wit:

A copy of account identified by William McEwen, and which said account is attached to the bill of exceptions herein, marked Exhibit "E" and made a part of said bill of exceptions. (Record, p. 40.)

VIII.

The Court erred in holding and deciding that the testimony introduced in said cause was not sufficient to warrant a verdict in favor of plaintiff. (Record, p. 50.)

IX.

The Court erred in withdrawing the cause from the jury. (Record, p. 50.)

X.

The Court erred in rendering a judgment of dismissal of said cause. (Record, p. 19.)

BRIEF OF THE ARGUMENT.

I.

The first reason assigned by the Court for withdrawing the case from the jury was that there was no evidence in the record showing that the Bank notified Waterhouse that it had accepted his letter of guaranty. The basis for the Court's ruling was that the decision in the case of *Douglass v. Reynolds,* 7 Pet. 113, was applicable to the facts in the case at bar. In that case, the Supreme Court, speaking by Mr. Justice Story, said: (p. 125)

"A party giving a letter of guarantee has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it or not. It may be most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate, in a great measure, his course of conduct and his exercise of vigilance in regard to the party in whose service it is given. Especially is it important in the case of a continuing guarantee, since it may guide his judgment in recalling or suspending it."

The letter of guaranty in that case read as follows:

"Port Gibson, December, 1807.

Messrs. Reynolds, Byrne, and Co.

Gentlemen: Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his paper, or advances in cash. In order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding $8,000, should the said Chester Haring fail to do so.

Your obedient servants,

James S. Douglass,
Thomas G. Singleton,
Thomas Going."

It will be noticed that the letter was written in Port Gibson, Mississippi, by persons who apparently had no pecuniary interest in the business of Mr. Haring, that the party guaranteed lived in another State, that the letter is a mere offer or proposal on the part of the guarantors, that the guarantors did not guarantee *payment,* but collection only, that the tenor of the letter, the residence of the parties, and the fact that the guarantors were accommodation guarantors only, preclude the idea that any request for guaranty had been made by the party to be guaranteed, and that there is no statement in the opinion that the guarantors ever knew that Haring had even delivered the letter to Reynolds, Byrne and Company. The facts in that case, then, bring it squarely within the rule enunciated in *Davis Sewing Machine Co. v. Richards,* 115 U. S. 524, 527:

"But if the guaranty is signed by the guarantor without any previous request of the other party, and *in his absence,* for no consideration moving be-

tween them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract." (Italics ours.)

In the case at bar, however, Frank Waterhouse, a shareholder and director and pecuniarily interested in a company which bore his name and which was then owing the Bank a large sum of money, goes to London, England, and there, in the presence of two of the officers of the Bank, executes a letter of guaranty, in which, among other things, he says: I hereby guarantee you *payment* (not collection) of all sums for which my company is now or may become indebted to you up to the amount of £21,000 sterling, plus interest, and I declare to you that you shall be entitled to require from me, whenever you think fit, a payment or payments to account of *my liability;* that you may grant time or indulgence to or give up securities belonging to Frank Waterhouse, Limited, without consulting me or affecting my obligation to you.

If this is not an absolute guaranty, it would be difficult to conceive of a guaranty which is absolute.

All the authorities, however, hold that in the case of an absolute guaranty, no notice of acceptance need be given to the guarantor.

"An absolute guaranty is an unconditional promise of payment or performance on default of the principal. To bind the guarantor it is not necessary that there should be notice of acceptance of the guaranty or notice of default of the principal, or

that any steps should be taken to enforce the contract guaranteed against the principal."

14 Amer. & Eng. Ency. of Law, p. 1141.

"Where a guaranty is absolute, no notice of its acceptance is necessary to fix the liability of the guarantor, unless notice be made a condition of the guaranty."

14 Amer. & Eng. Ency. of Law, p. 1145, and cases cited.

In addition to the cases cited in support of the foregoing text, we call the Court's attention to the following decisions:

Paige v. Parker, 8 Gray (Mass.) 211.
Bank of California v. Union Paving Co., 111 Pac. 573, 60 Wash. 456.
United States Fidelity & Guaranty Co. v. Ruffler, 239 U. S. 17.
People's Bank of New Orleans v. Lemarie, 106 La. 429.
Cowan v. Roberts, 134 N. C. 415, 46 S. E. 979.
McKee v. Needles, 98 N. W. 618.
Manry v. Waxelbaum, 33 S. E. 701, 704.
Reese v. W. T. Rawleigh Medical Co., 172 S. W. 820.
Booth v. Irving Nat. Exch. Bank, 82 Atl. 652.
J. R. Watkins Medical Co. v. Brand, 143 Ky. 468, 136 S. W. 867, 33 L. R. A. (N. S.) 960.
Bryant v. Stout, 44 N. E. 68, 45 N. E. 343.
Wheeler v. Rohrer, 52 N. E. 780.
Frost v. Standard Metal Co., 215 Ill. 240, 74 N. E. 139.
Note in 16 L. R. A. (N. S.) at pp. 354, 357, 359.
Note in 15 Am. & Eng. Ann. Cas., p. 1164.
Note in 105 Am. St. Rep., p. 514.

Moreover, in view of the fact that Frank Waterhouse was a director and shareholder in Frank

Waterhouse, Limited, no notice of acceptance to him was necessary.

In the case of *Doud et al. v. National Park Bank of New York,* 54 Fed. 846, the syllabus is as follows:

"A personal guaranty given by stockholders and directors of a bank to another bank, in consideration of 'loans, discounts, or other advances to be made,' for the repayment of any indebtedness thus created, imposes a liability on the guarantors, when acted on by the guarantee, though no notice of acceptance of the guaranty was given; for the contract shows a personal interest of the guarantors in the advances, constituting a consideration moving to them."

See also:

Bond v. John V. Farwell Co., 172 Fed. 58, 63.
Brand on Suretyship and Guaranty, Sec. 214.

II.

The remaining ground for the Court's action in withdrawing the case from the jury was that the Court thought that payment, when made by Gill, was made on behalf of McNab and others, and that, at the time, Gill did not intend to take, nor did the Bank intend to grant, an assignment of Waterhouse's guaranty.

We understand the rule to be that "a stranger, at the time he pays to the creditor the amount of the debt, may take an assignment of it without the consent or knowledge of the debtor; and if when he pays the amount, there be an express agreement that the debt is to be assigned to the stranger, this would amount to an equitable assignment of the debt, though no formal assignment was ever exe-

cuted; for this understanding shows that the stranger did not pay the debt, but really purchased it, which of course he could do without the consent of the debtor."

Neely v. Jones, 16 W. Va. 625, 37 Am. Rep. 794, 799.

In Vol. 27 Amer. & Eng. Ency. of Law, p. 356, it is said:

"In order that one, having no interest to protect, who pays the debt of another, or advances money for the purpose, may be entitled to succeed to the rights and remedies of the creditor in respect of the debt so paid, there must be a convention or agreement to that effect. This convention or agreement may be made with either the debtor or creditor."

See also:

Crippen v. Chappel, 11 Pac. 453, 455.
Wilkin v. Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204, 216.
Contoocook Fire Precinct v. Town of Hopkinton, 53 Atl. 797, 799.

If, therefore, there is any material or relevant testimony in the record from which the jury might have determined that the parties at the time of payment did intend that the guaranty of Waterhouse should be assigned to Gill, then the non-suit should not have been granted.

James Gill, the grandnephew and assistant in business of John Gill, and one of the executors of his estate, testified as follows:

"I have no direct personal knowledge of the initiation of the transaction between the late John

Gill and the Commercial Bank of Scotland, Ltd., but my understanding is that the bank were desirous that the debt due by Frank Waterhouse, Ltd., should be repaid and that Mr. Alexander McNab, who was one of the guarantors and who was not, I understand, in a position to meet the guarantee if it were enforced against him, approached the late John Gill as a friend and asked him to *take over the debt;* that the late John Gill agreed to do so, and paid off the debt, which amounted to £22,-897:16:5, and obtained the assignation before mentioned by the Commercial Bank of Scotland, Ltd., in favor of himself as an individual, *in consideration of said payment* by him to the bank, and that the payment was made by cheque or cheques by the late John Gill." (Record, pp. 26, 27.)

Certainly this statement shows that it was the intention of the parties that the letter of guaranty of Waterhouse should, in consideration of the payment by Gill, be assigned to him.

James Lawson Anderson, the Secretary of the Bank, testified that "the payment of £22,897:16:5 was made to the Bank by the said John Gill *in exchange for* the assignation in his favor" (Record, p. 32), while William McEwen, Secretary of Frank Waterhouse, Limited, from August, 1898, and subsequently liquidator of the Company, testified:

"I should explain that on 7th April, 1908, I was appointed the voluntary liquidator of the company at an extraordinary general meeting of the shareholders held on that date. Subsequently I wrote to the Commercial Bank of Scotland, Ltd., intimating my appointment and asking them to send me a certified statement of their claims in the liquidation. They informed me that the company's indebtedness

to them had been settled by Mr. John Gill, S. S. C., Edinburgh, and that they had assigned their claim to him. Mr. Gill subsequently rendered his claim to me as liquidator of the company and I admitted the claim. I have paid to the said John Gill, and after his death to his executors, dividends in respect of Mr. Gill's claim in the liquidation. The sums which I have paid to him and them to date amount to £2924.17.4." (Record, pp. 36, 37.)

Parenthetically, it may be said, that the above quoted testimony of Anderson and a portion of the above quoted testimony of McEwen was objected to on the part of the defendant on the ground that such testimony was hearsay, but, as we shall hereinafter show, any such objection was waived.

Despite this testimony, the trial Court determined, as a matter of law, that at the time payment was made Gill did not intend to take, or the Bank intend to grant, an assignment. The Court's conviction that the assignment was an afterthought was based upon four facts, the first one of which is that McNab, who was a stockholder in Frank Waterhouse, Limited, also liable to the Bank on letters of guaranty, and a client of Gill, asked Gill to take over or purchase the debt. But how does the relationship of McNab to Frank Waterhouse, Limited, or to the Bank, or to Gill, absolutely preclude the idea that Gill and the Bank entered into an agreement providing that, in consideration of Gill's paying to the Bank the amount of its claim, Gill should succeed to the rights and remedies of the Bank?

The second reason assigned by the Court is that Frank Waterhouse and Frank Waterhouse, Limited, entered into a contract in October, 1900, by the terms of which Frank Waterhouse, Limited, was to discharge the London indebtedness of the Company upon certain payments being made and certain acts being performed by Frank Waterhouse. This agreement was erroneously admitted in evidence, as we shall hereinafter show. But eliminating that contention from consideration now, still there is no evidence in the record that Frank Waterhouse ever paid a single dollar of the amount required to be paid by said contract. If he has performed the conditions imposed upon him by the agreement, why did he not, years ago, demand the surrender to him or the cancellation of his letter of guaranty? How the execution of this contract had any bearing on the case at the time the non-suit was granted, we are at a loss to understand.

The next reason assigned by the Court is that Gill did not secure a written assignment of the remaining letters of guaranty. It is true that no formal written assignment of the remaining letters of guaranty was executed, but when payment was made the Bank sent these letters to Gill, and the equitable title to them has, ever since payment, been in Gill.

In re Hallett & Co. (1894), 2 Q. B. 258.

But how can the Court determine, as a matter of law, that because one letter of guaranty was not assigned, another guaranty was also not assigned?

The fourth reason assigned by the Court was that payment was made on February 15, 1907, but that the written assignment was not executed until October, 1907. But, surely, mere delay in executing a written instrument is not sufficient, as a matter of law, to determine that there was no agreement for assignment made at the time of payment.

"But the doctrine generally adopted is that a conventional subrogation can result only from a direct agreement to that effect made with either the creditor or the debtor, and that it is not sufficient that a person paying the debt of another should do so merely with the understanding on his part that he is to be subrogated to the rights of the creditor, though, if the agreement has been made, a formal assignment will not be necessary. And the agreement may be shown by *subsequent acts* which indicate a *prior agreement.* Thus, where a stranger pays the amount of an execution which has been put into the hands of a sheriff, a subsequent assignment of the judgment by the plaintiff therein to the person making the payment will be regarded as showing that the payment was made in *purchase,* and not in discharge of the judgment."

Sheldon on Subrogation, §248.

While delay may be a circumstance to be weighed by the jury in determining whether an antecedent agreement for assignment was made, yet the jury had the right to consider that the delay may have been occasioned by the fact that the officers executing the assignment, and presumably the only ones authorized to do so, resided at Edinburgh, while the transactions of Frank Waterhouse, Limited, took place at the London branch of the Bank.

The jury also had a right to consider that the Bank acted honestly. The Bank did not, however, act with honesty of purpose when it executed the written assignment, if there was no agreement made at the time of payment that Gill should succeed to all the rights and remedies of the Bank. Moreover, if the problem as to whether a previous convention for assignment had been concluded was an evenly balanced one in the minds of the jurors, would they not have a right to consider the rule that "it is not in accordance with common experience for one man to pay the debt of another without receiving any benefit from his act." (128 U. S. 423.) But, above all, the jury did have a right to consider the testimony of James Gill that John Gill purchased the debt and in part consideration for the money paid by him was to receive an assignment; and also the testimony of Anderson that payment was made in exchange for the assignment.

Penwell v. Flickinger, 129 Pac. 323, and *Moran v. Abbey,* 63 Cal. 56, cited and relied upon by counsel for defendant in the trial court, are not in point. In the first of these cases it appears that the defendants agreed to sell to the Beaverhead Ranch Company an automobile for $956.50. The purchase price was paid, but the defendants never delivered the automobile, nor did they return the money. Penwell, who had induced the Company to buy this particular car from the defendants, felt that he was responsible for the Ranch Company's loss. Actuated by what the Court denominates "a delicate and

praiseworthy sense of business ethics," he went to Butte, bought for the Ranch Company an automobile worth $795.50, and then paid $161.00 in cash to the Ranch Company. The Ranch Company did not make any agreement with Penwell to assign its claim to him, nor did the defendants request Penwell to return or repay the Ranch Company the money theretofore paid them, but, as a matter of fact, expressly dissented from such act. In September, 1910, Penwell brought suit against the defendants. Four months later the Ranch Company assigned its claim to Penwell, and he then filed a supplemental complaint in which he apparently for the first time alleged that an assignment of the Ranch Company's claim had been made to him. The Court said:

"Equally certain is it that there was no subsequent ratification or promise to repay, *and there is not a suggestion in the record of any oral assignment of its claim from the company to the respondent when he made the payment, or of any understanding that it should be assigned or kept on foot for his benefit.* Under such circumstances the general rule is that the payment extinguishes the debt, at least so far as the creditor is concerned."

If it can be said that there is absolutely no testimony in the case at bar which shows that an agreement for assignment was made at the time of payment, then the Penwell case is in point; otherwise, not.

The case of *Moran v. Abbey,* 63 Calif. 56, is also not in point. On December 30, 1875, Abbey, together with one Heffner, an accommodation surety

only, executed a note in favor of George Hancock. Hancock left the note at a bank for collection. Prior to the maturity of the note, Abbey turned over all his property to Moran and then became a voluntary or involuntary bankrupt. The creditors of Abbey had attached the property turned over to Moran, and between him and them a contest arose, in which he was cited to appear in the bankruptcy court for examination under oath touching the property or effects of Abbey which he had in his possession or under his control. After being cited to appear for examination, but before so appearing, he went to the bank and paid to the bank the amount of the note. Moran knew Hancock, but never had any conversation with him relative to this note until about three years after the date of its payment, when, acting upon the advice of his attorney, he went to Hancock and induced Hancock to execute a qualified endorsement of the note. In view of the fact that at the time of payment to the bank Hancock knew nothing of the transaction, it cannot be argued that Hancock entered into any contract whatsoever with Moran.

It will thus be seen that in both of these cases there was not only no testimony in the record showing or tending to show that a prior convention for assignment had been made, but also that the facts proven precluded any inference even of the making of such an agreement. The plaintiff in each of these cases was defeated, not because the written assignment was executed *subsequent* to the

making of the prior agreement, but because no such prior agreement was ever made.

III.

Some technical objections relative to the admission or exclusion of certain testimony remain for consideration.

(a) During the course of the trial, certain testimony was offered in evidence, to which objection was made on the ground that such testimony was hearsay. The testimony so objected to is the following:

That of Anderson, Secretary of the Bank, to-wit:

"The payment of £22,897:16:5 was made to the bank by the said John Gill in exchange for the assignation in his favor. The payment was made by a cheque of his own, I understand. I have not the particulars of the cheque." (Record, p. 32.)

That of McEwen, Secretary and Liquidator of Frank Waterhouse, Limited, to-wit:

"Subsequently I wrote to the Commercial Bank of Scotland, Ltd., intimating my appointment and asking them to send me a certified statement of their claims in the liquidation. They informed me that the Company's indebtedness to them had been settled by Mr. John Gill, S. S. C. Edinburgh, and that they had assigned their claim to him." (Record, pp. 36, 37.)

That of McEwen, to-wit:

"I have examined the copy of the accounts of Frank Waterhouse, Ltd., with the Commercial Bank of Scotland, Ltd., appended to the deposition of George Sutherland Coutts, taken on the 17th December, 1913, and I am satisfied that said accounts

correctly set forth the amount advanced to said Frank Waterhouse, Ltd. The amounts due by Frank Waterhouse, Ltd., to the Bank at 31st October, 1903, were as follows: (1) On the current or general account £1151.17.9. (2) On the loan account £15,000 and (3) on No. 2 account £3479.13.3. These amount in all, with interest to February 15, 1907, to £22,897.16.5." (Record, p. 35.)

And a copy of the account between Frank Waterhouse, Limited, and the Bank, which said copy was identified by McEwen and is attached to the bill of exceptions as Exhibit "E." (Record, p. 40.)

The Court reserved its ruling on these objections, but at the conclusion of the trial, in rendering his oral opinion, said:

"The objections to the offers of testimony which have been reserved must be sustained and the motion to dismiss must be granted." (Record, p. 52.)

It is apparent from the language of his opinion that he sustained the objections because of the fact that he considered that the execution of the assignment was an afterthought, and not because the testimony was hearsay. If it be urged in this Court, however, that this testimony should have been excluded from the jury because of the fact that it was hearsay, we reply that it is not open to the defendant to make this contention. All of the testimony, as we have said, except that relative to the jurisdiction of the Court, was taken under a stipulation expressly waiving all objections save as to the relevancy and materiality of any question or answer or part

thereof. (Record, p. 53.) The testimony above quoted was certainly relevant and material, and though, by reason of judicial decisions in this country, it might have been incompetent because hearsay, yet, by the express stipulation of the parties, hearsay testimony, if relevant and material, was admissible.

In the case of *Fourth Natl. Bank v. Albaugh,* 188 U. S. 734, 737, the Supreme Court said:

"In these days, when the whole tendency of decisions and legislation is to enlarge the admissibility of hearsay where hearsay must be admitted or a failure of justice occur, we are not inclined to narrow the lines."

If the tendency of judicial decisions is to enlarge the admissibility of hearsay, it certainly cannot be fairly argued that hearsay testimony should be excluded when the parties have expressly stipulated that it was admissible.

(b) The seventh assignment of error (numbered VI herein) is that the Court erred in admitting, over the objection of plaintiff on the ground that it was irrelevant and immaterial, an agreement made on October 6, 1900, between Frank Waterhouse, of Seattle, Washington, on the one part, and Frank Waterhouse, Limited, a corporation of London, E. C., on the other part. This agreement, in substance, provided that an American company should be formed by Frank Waterhouse, and that such American company should purchase the property of Frank Waterhouse, Limited, paying therefor $50,000

in cash and $180,000 in bonds to be executed by such American company and to be in such form as should be satisfactory to the attorneys of Waterhouse, Limited. It further provided that the American company should also pay certain debts of Frank Waterhouse, Limited, aggregating about $50,000. Upon such payment being made by the American company, Frank Waterhouse, Limited, agreed to discharge all of its London indebtedness with said purchase money, except the indebtedness due Trinder, Anderson & Co. As we have heretofore said, there is not a particle of proof in the record that Frank Waterhouse ever paid a single dollar of the amount which the agreement provided that he, or the company to be formed by him, should pay. Furthermore, it will be noticed that the agreement does not provide for the surrender or cancellation of the letter of guaranty executed by Waterhouse in favor of the bank.

But, irrespective of all this, under what possible theory was this agreement admissible in evidence? It did not fall within any of the issues made by the pleadings. It certainly was not admissible in evidence to prove the facts alleged in the first separate and affirmative defense. (Record, p. 11.) That defense, in substance, avers that the money owing by Frank Waterhouse, Limited, to the Bank had been paid. This agreement, however, is not a writing showing payment, but, looking at it in a light most favorable to defendant, it is but a writing evidencing an accord and satisfaction. It is familiar law, how-

ever, that under a plea of payment an accord and satisfaction may not be shown.

Morley v. Culverwell, 7 M. & W. 174, 180.
Poer v. Johnson, 96 N. E. 189.
People's Bank v. Stewart, 117 S. W. 99, 102.

(c) The fifth and eighth assignments of error (numbered IV and VII herein) are that the Court erred in excluding a copy of the accounts between Frank Waterhouse, Limited, and the Bank, and the testimony of McEwen identifying these accounts. McEwen testified:

"Said accounts correctly set forth the amount advanced to said Frank Waterhouse, Ltd. The amounts due by Frank Waterhouse, Ltd., to the Bank at 31st October, 1903, were as follows: (1) On the current or general account £1151.17.9. (2) On the loan account £15,000 and (3) on No. 2 account £3479.13.3. These amount in all, with interest to February 15, 1907, to £22,897.16.5." (Record, p. 35.)

It is certainly a strange and novel doctrine that the secretary of a company may not testify that such company owed on a certain date a certain sum of money and that an account, which he identifies, is a correct copy of the account between his company and its creditor.

(d) The third assignment of error (numbered II herein) is based upon the exclusion of a copy of the account between The Commercial Bank of Scotland, Ltd., and Frank Waterhouse, Ltd., said copy being attached to the assignment from the Bank to Gill. This copy of the account was made in 1907. It was excerpted from the books of the Bank and certified

to as correct by William Bamford Lang, who was the accountant at the London branch of the Bank from 1894 to 1911. (Record, p. 41.) This copy of the account was taken from the ordinary books of the Bank kept in the regular course of the Bank's business, the books at that time being in the custody and control of the Bank. (Record p. 42.) The payments shown by said accounts were actually made against checks drawn by Frank Waterhouse, Ltd. (Record p. 44), and the correctness of the accounts was never disputed by Frank Waterhouse, Ltd., or by anyone else. (Record p. 45.) The objection to the introduction of this account was based upon the fact that this copy of the account was not the best evidence of the account as shown by the books of the Bank. It may be said, in the first place, that it was not necessary to produce before the Commissioner the books of the Bank (Wigmore on Evidence, §1223). But irrespective of this, we think the defendant waived the production of the books of the Bank. The evidence was certainly relevant and material, and though it might have been incompetent because hearsay or because not the best evidence, yet, by the express stipulation of the parties, the testimony was admissible.

Respectfully submitted,

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